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No. _____

In The Supreme Court of the United States

SIDNEY COAL CO., *et al.*,

Petitioners,

v.

SOCIAL SECURITY ADMINISTRATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, directed the Commissioner of Social Security to assign newly created statutory health benefit liability to a former employer of each coal retiree as prescribed in liability assignment rules laid out in section 9706(a)(1)-(3). 26 U.S.C. § 9706(a)(1)-(3). In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court held that the assignment of liability under section 9706(a)(3) was unconstitutional as applied to a former employer that did not sign a 1974 or later coal wage agreement.

The question presented is whether, in the wake of *Eastern Enterprises*, the Commissioner may invoke retroactivity principles developed in cases such as *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), to reassign to Petitioners the financial liability that the Court held could not constitutionally be imposed on Eastern Enterprises or another pre-1974 signatory employer, where the 1992 Congress demonstrably intended to shield Petitioners from liability for these particular retirees, and subsequent Congresses have never amended the precise liability assignment powers conferred to the Commissioner in the 1992 enabling legislation.

PARTIES TO PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Sidney Coal Company, Inc., Martin County Coal Corporation, New Ridge Mining Company, A.T. Massey Coal Company, Inc., Road Fork Development Company, Inc., Rawl Sales & Processing Co., Tennessee Consolidated Coal Company, Omar Mining Company, and Peerless Eagle Coal Co., Inc. The Petitioners were plaintiffs-appellees below.

Massey Energy Company (NYSE:MEE) is the parent of Petitioner A.T. Massey Coal Company, Inc. and the ultimate parent corporation of Petitioners Sidney Coal Company, Inc., Martin County Coal Corporation, New Ridge Mining Company, Road Fork Development Company, Inc., Rawl Sales & Processing Co., Tennessee Consolidated Coal Company, Omar Mining Company, and Peerless Eagle Coal Co., Inc.

The Respondents, defendants-appellants below, are Jo Anne B. Barnhart, in her capacity as Commissioner of the Social Security Administration; Michael H. Holland, Elliot Segal, Thomas O.S. Rand, Carl E. Van Horn, Gail R. Wilensky, William P. Hobgood, and Marty D. Hudson, in their capacity as trustees of the United Mine Workers of America Combined Benefit Fund; and the United Mine Workers of America Combined Benefit Fund.

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Sidney Coal Company, Inc., Martin County Coal Corporation, New Ridge Mining Company, A.T. Massey Coal Company, Inc., Road Fork Development Company, Inc., Rawl Sales & Processing Co., Tennessee Consolidated Coal Company, Omar Mining Company, and Peerless Eagle Coal Co., Inc., by their undersigned counsel, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 427 F.3d 336 and is reprinted in the Appendix ("App.") hereto at 1a-32a. The

Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky is reported at 221 F. Supp. 2d 755 and is reprinted in the Appendix hereto at 33a-87a.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Coal Industry Retiree Health Benefit Act of 1992, which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056, and (codified as an amendment (subtitle J)) to the Internal Revenue Code at 26 U.S.C. §§ 9701-9722), provides in pertinent part:

§ 9706. Assignment of eligible beneficiaries

(a) In general.—For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any other related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which–

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which–

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any oth signatory operator prior to the effective date of the 1978 coal wage agreement.

(b) Rules relating to employment and reassignment upon purchase.–For purposes of subsection (a)–

(1) Aggregation rules.–

(A) Related person.–Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

(B) Certain employment disregarded.–Employment with–

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement,

shall not be taken into account.

STATEMENT OF THE CASE

It is undisputed that, as enacted in 1992, the Coal Industry Retiree Health Benefit Act ("Coal Act" or "Act"), 26 U.S.C. §§ 9701-9722, does not permit the Commissioner of Social Security ("Commissioner") to assign liability to Petitioners for the coal industry retirees at issue. Had the Commissioner assigned liability for these retirees to Petitioners before the Court's ruling in *Eastern Enterprises*, 524 U.S. 498 (1998), a reviewing court would have voided the assignments as *ultra vires* acts in violation of the specific responsible operator assignment criteria delineated in section 9706(a) of the Coal Act, 26 U.S.C. § 9706(a).

This notwithstanding, the Commissioner concluded that the intervening decision in *Eastern Enterprises* freed her from the exacting constraints of the Coal Act's assignment criteria, and permitted her to reassign to Petitioners liability that would otherwise be plainly unlawful. In effect, the Commissioner read *Eastern Enterprises* as requiring her to divine in 1999 the overriding policy objective of this 1992 compromise legislation, and plumb congressional intent to determine how the 102nd Congress, which wrestled with this special interest legislation, would have responded to a partial

invalidation or frustration of one of its three assignment criteria.

The district court found that the Commissioner's assignment of this liability to Petitioners in 1999 violated the plain language of the 1992 authorizing statute, and was *ultra vires*. App. 83a-84a. The court of appeals reversed the district court on the basis that focusing on the Legislature's limitations on the powers it originally conferred to the Commissioner to assign liability ignored the retroactive effect of *Eastern Enterprises*. App. 24a.

The Court's retroactivity jurisprudence does not, however, support the Commissioner's usurpation of Congress's plenary authority in its fiscal legislation to determine who will and will not be subject to taxation.

A. History of the Coal Act

The history of the health care crisis in the unionized coal industry in the late 1980s and the events culminating in the passage of legislation designed to remedy the crisis are not unfamiliar to this Court. *Eastern Enters.*, 524 U.S. at 511-14; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 444-47 (2002); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).

Between 1950 and 1992, health care for thousands of retired United Mine Workers of America ("UMWA") coal miners (and their dependants) was provided through multiemployer plans established and maintained through periodic collective bargaining agreements, known as National Bituminous Coal Wage Agreements ("NBCWA"). *Eastern Enters.*, 524 U.S. at 506-13. NBCWA signatory coal operators were contractually obligated to contribute to

these multiemployer plans. For decades, they were run on a pay-as-you-go basis with plan trustees adjusting benefit levels to fit budgetary constraints. *Id.* at 508-09. Retiree health benefits were financed by production or hours-based royalty payments paid into the multiemployer plans by NBCWA signatory coal operators. *Id.* at 506-10.

The amount a signatory employer contributed to the plans bore no relationship to the number of retirees in the plan, if any, who had worked for the contributing employer. The plans provided health benefits to eligible retirees without regard to whether their employers had gone out of business or continued to have a contractual obligation to contribute. *Id.* at 511; *see generally*, House Committee on Ways and Means, *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, 104th Cong., 1st Sess., 67-68 (Comm. Print 1995) (hereinafter "*Coal Act Implementation*").

By the late 1980s, a series of circumstances had combined to drive the plans to the brink of insolvency. *Sigmon Coal*, 534 U.S. at 444-45. It was widely reported that for every $1 a then-current NBCWA signatory coal operator paid into the plans for its own pre-1976 retirees, it was paying an additional $3 for other companies' orphaned pre-1976 retirees. *Coal Act Implementation* at 57-58. The funding crisis came to a head in 1989, when the UMWA struck Pittston Coal Company, a large coal operator that refused to sign the then-current 1988 NBCWA and stopped contributing to the plans. *Eastern Enters.*, 524 U.S. at 511. This lengthy strike was settled only after the Secretary of Labor intervened and committed to establishing a commission to study the UMWA retiree health crisis and furnish recommendations to Congress. *Id.* The Advisory

Commission on UMWA Retiree Health Benefits ("Coal Commission") conducted extensive hearings and issued a lengthy report, but failed to arrive at a unified conclusion or recommendation as to how to finance retired UMWA miners' health benefits. *Id.* at 512; *Coal Act Implementation* at 77-81.

Congress focused on the coal funding question in 1991. The Senate Finance Committee held hearings, and a measure approved by both chambers was included as part of a larger piece of tax legislation. *Id.* at 513; *Sigmon Coal*, 534 U.S. at 446 n.6. This proposed solution would have imposed statutory responsibility on companies that had contributed to the multiemployer plans when they were signatory to the 1978 or subsequent NBCWAs to provide benefits to their retirees, even if they had no current contractual obligation to contribute. *Coal Act Implementation* at 12. Recognizing that there would still be thousands of retired miners who would remain "orphaned" even with this reachback approach, the legislation provided for an industry-wide tax to defray the remaining orphans' health benefit costs. The effort was for naught because the entire tax measure was vetoed in March 1992 as part of the Bush Administration's "no new taxes" pledge. *Sigmon Coal*, 534 U.S. at 446 n.6.

Congress revisited the issue on the heels of the veto and in the face of the scheduled expiration of the then-current 1988 NBCWA. *Id.*; *Eastern Enters.*, 524 U.S. at 513; *Coal Act Implementation*, at 81-82. Shortly before its expiration, the Legislature, through the passage of the Coal Act, achieved its purpose of ensuring the uninterrupted provision of health benefits to a fixed pool of some 115,000 UMWA miners (and dependents) who retired between 1950

and 1993. Only coal miners who retired prior to January 1, 1976 are at issue in this case.

As enacted, the Coal Act included a provision at section 9706(a)(3) that imposed financial liability on companies that had been signatory to coal wage agreements prior to 1978. 26 U.S.C. § 9706(a)(3). This third, or lowest, of the 3-tiered Coal Act assignment rules directed as follows: if a retiree cannot be assigned under the first two assignment rules, 26 U.S.C. § 9706(a)(1)-(2), to a former employer that signed a 1978 or subsequent NBCWA, statutory liability must be assigned, if at all, "to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement," 26 U.S.C. § 9706(a)(3).

Although the Coal Commission and the vetoed coal tax provision had not proposed extending liability to pre-1978 signatory companies, *Coal Act Implementation* at 57, Congress determined that they were integral to a financing scheme that could be enacted.[1]

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[1] *See, e.g.*, 138 Cong. Rec. S17636 (daily ed. Oct. 8, 1992) (statement of Sen. Warner) ("A period of arduous negotiations commenced. A comprehensive plan emerged, mandating contributions by not only present but former [Bituminous Coal Operators' Association] members as well. In general, dating back to 1950, the former employer of the longest duration will be assigned the health costs of the retiree."); *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 522 (6th Cir. 2001) ("To prevent the consolidation of liability upon a relatively small number of coal producers, the Coal Act also contained what has become known as a 'super reachback' provision. . .

A 1995 Congressional Report referenced by the Court in *Sigmon Coal*, 534 U.S. at 445 n.4, and *Peabody Coal*, 537 U.S. at 154, reinforces the pivotal role of section 9706(a)(3) – the super-reachback provision – in the passage of the Coal Act:

> [The super-reachback concept] encompasses any company which had signed any coal wage agreement dating back to 1946, or is related to such a company as defined in the law. The "super-reachback" concept emerged in the full Senate version of the [Coal Act], approved as an amendment to H.R. 776, the National Energy Security Act of 1992, on the Senate floor on July 29, 1992. It was not discussed in any public hearings. It represented a bipartisan compromise within the Senate and between the Senate and the Bush Administration.

Coal Act Implementation at 57 (explaining the distinction between the limited reachback, *see* 26 U.S.C. § 9706(a)(1)-(2), and super-reachback concepts, *see* 26 U.S.C. § 9706(a)(3)).

As the Court has previously explained, the Coal Act is quintessential compromise-driven, special interest legislation and this assignment criteria proves no exception.

. . [S]uper reachback companies became responsible for health benefits under the Combined Fund despite having opted out of UMWA collective bargaining agreements and previous health benefit funds for many years.") (citations omitted).

> Crafting the legislative solution to the crisis . . . was no easy task. The Coal Act was passed amidst a maelstrom of contract negotiations, litigation, strike threats, a Presidential veto of the first version of the bill and threats of a second veto, and high pressure lobbying, not to mention wide disagreements among Members of Congress.

Sigmon Coal, 534 U.S. at 445-46 (footnotes omitted).

By way of illustration, shortly after the House-Senate Conference on the National Energy Bill, and immediately prior to the House vote on that entire bill, the Chairman of the House Ways and Means Committee stated:

> The conference agreement also includes the provisions of the Senate bill which establish rules for the financing and provision of health benefits to retired United Mine Workers and their families.
>
> * * *
>
> The House conferees are very uneasy with the provision included in the Senate bill for financing these benefits. It appears to create numerous inequities among the companies that will be required to pay for these benefits.
>
> * * *
>
> Yet in spite of these seemingly major and perhaps fatal flaws in their amendment, the Senate presented this to the House conferees on a take-it-or-leave-it basis -- threatening

> defeat of the most comprehensive energy legislation in years if even the smallest problem were corrected by House conferees.

138 Cong. Rec. H11408 (Oct. 5, 1992) (statement of Rep. Rostenkowski).

The Court summarized the Coal Act's tumultuous birth in *Sigmon Coal* as follows:

> [N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. Indeed, this legislation failed to ease tensions among many of the interested parties. Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole.

Sigmon Coal, 534 U.S. at 461 (citations omitted).

Six years after the Coal Act became law, and five years after the Commissioner assigned liability to more than 174 operators for their former employees in accordance with the rules in section 9706(a)(3), *Coal Act Implementation* at 23, this Court enjoined the application of section 9706(a)(3) as applied to Eastern Enterprises, a pre-1974 NBCWA signatory. *Eastern Enters.*, 524 U.S. 498. In *Eastern Enterprises*, the Court held the Coal Act invalid as to an assigned operator that had not signed the 1974 or any later NBCWA, based on the fact that the 1974 NBCWA was the

first coal wage agreement to contain a promise of lifetime benefits for retired miners. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, declared that, as applied to Eastern Enterprises, the Coal Act constituted a taking, and Justice Kennedy, concurring in the judgment and dissenting, concluded that the Act violated due process. *Id.* at 538, 550.

In response, the Commissioner voided the assignments she had previously made to Eastern Enterprises and, consistent with judicial retroactivity principles, to other "similarly situated" operators, *i.e.*, those who had not signed a 1974 or later NBCWA. (These affected pre-1976 retirees are hereafter collectively referred to as the "Eastern Retirees"). As a result, over 130 companies were relieved of liability for over 8,000 Eastern Retirees. General Accounting Office, No. AIMD-00-280R, *Financial and Legal Issues Facing the United Mine Workers of America Combined Benefit Fund* (Aug. 15, 2000) ("One hundred and thirty-two coal companies and approximately 8,000 beneficiaries were affected by this decision").

The Commissioner initially reallocated all 8,000 Eastern Retirees to the unassigned category meaning, for funding purposes, their health benefits would be paid primarily by transfers of interest earned on the Abandoned Mine Land Reclamation Fund ("AML Fund"). App. 88a. Beginning in 1999, however, the Commissioner directed administrators to work back through the Eastern Retirees' SSA wage histories, redact time worked for Eastern Enterprises and other similarly situated super-reachback companies, in the hope of identifying any other "signatory operator" for whom they had once worked, which like Eastern Enterprises and other voided super-reachback

companies, remained "in business." Social Security Administration, Office of Program Benefits Fax, dated Jan. 13, 1999 to SSA Coal Act Program Service Centers. (App. 88a-89a).

Although section 9706(a)(3) requires that assignments be made to "*the* signatory operator [remaining in business] which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement," 26 U.S.C. § 9706(a)(3) (emphasis added), the Commissioner decided to reassign the Eastern Retirees to the remaining signatory operators which had employed the retirees for the *next* longest period of time. *Cf.* 26 U.S.C. § 9706(a)(3).

The Commissioner eventually assigned some 1,500 Eastern Retirees in this manner to: (i) a 1974 (or later) NBCWA signatory coal operator that had employed the retiree for a lesser period than the retiree's pre-1974 signatory; or, (ii) to a former employer who had not signed a 1974 or subsequent NBCWA but who was related to a company that had. App. 10a. Among these were the 18 Eastern Retirees assigned to Petitioners in September 1999 whose assignments precipitated this lawsuit. App. 10a.

B. The Court of Appeals Decision

Petitioners sued the Commissioner in the Eastern District of Kentucky invoking the court's jurisdiction pursuant to 28 U.S.C. § 1331 for purposes of challenging the assignment to it of Eastern Retirees. The UMWA Combined Benefit Fund ("Combined Fund"), which administers the provision of health benefits to the retirees at issue,

intervened. Petitioners maintained before the district court that Congress did not authorize the Commissioner to reassign Coal Act liability to a next-in-line employer. The district court agreed and granted Petitioners' motion for summary judgment enjoining the Commissioner's 1999 assignments. App. 82a-86a.

The Commissioner and the Combined Fund appealed and the court of appeals reversed and ordered the injunction vacated. The court of appeals concluded that the Commissioner's reassignment of Eastern Retirees to Petitioners rested on a permissible construction of the Coal Act's assignment criteria.

The court of appeals rejected Petitioners' position that the text of the authorizing statute required that Eastern Retirees be designated as unassignable, and precluded an administrative decision imposing on them liability that Congress directed be imposed on a different long-time signatory employer. Petitioners pointed out that under section 9706 of the Coal Act, the responsible operator is a particular former employer, not every former employer.

The court of appeals rejected Petitioners' position that this Court's decision in *Sigmon Coal* (holding that SSA's assignment of liability to the purchaser of a defunct employer's operations violated the plain language of the Act) barred the Commissioner from imposing liability on them for retirees that Congress had determined in section 9706(a)(3) would be allocated to Eastern Enterprises or another similarly situated pre-1974 signatory employer. App. 23a.

Relying on this Court's judicial retroactivity doctrine, the Sixth Circuit concluded that the Commissioner's

assignments to Eastern Enterprises were invalid from the beginning (1993). The court of appeals further concluded (in lockstep with the D.C. Circuit and the Fourth Circuit Court of Appeals before it),[2] that this freed the Commissioner in 1999 to begin anew and impose liability for pre-1976 Eastern Retirees on their other former signatory employers. App. 25a. ("The Supreme Court's decision effectively excused now-ineligible companies from the list of coal operators to whom beneficiaries could be constitutionally assigned. . . . The SSA simply applied the statute to the newly narrowed pool [of available operators]").

Mirroring the rationale of the Fourth Circuit panel majority in *Pittston* (as adopted without discussion by the D.C. Circuit in *Elgin*), the court of appeals below concluded that the Commissioner's decision to assign Eastern Retirees to Petitioners should be analyzed under the Court's decision in *Peabody Coal*. App. 28a. The court of appeals concluded that the emphasis in *Peabody Coal* on effectuating the Act's purpose of allocating as many retirees as possible to statutorily-defined most responsible former employers supported the Commissioner's assigning liability to Petitioners in this instance. App. 28a.

Petitioners pointed out that *Peabody Coal*, which found no jurisdictional bar to the Commissioner's making

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[2] *See Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), *cert. denied sub nom. The Brinks Co. v. United States*, 125 S. Ct. 1589 (2005); *Elgin Nat'l Indus. v. Barnhart*, Nos. 04-5243 and 04-7094, 2005 U.S. App. LEXIS 7361, at *1 (D.C. Cir. Apr. 27, 2005) (unpublished) ("Elgin's argument pertaining to the reassignment of beneficiaries after Eastern Enterprises is rejected for the reasons set forth in [*Pittston*].")

assignments to *responsible* operators beyond the October 1, 1993 date Congress prescribed for doing so, dealt with a genuinely unforeseen situation, namely the Commissioner's delay in matching coal retirees to companies in the manner Congress actually authorized and intended under the section 9706(a) assignment rules. The Sixth Circuit examined the Separability clause that Congress built into the Coal Act assignment criteria by incorporating its authorizing statute in the Internal Revenue Code, *see* 26 U.S.C. § 7852(a); App.24-25a. The court of appeals concluded, nonetheless, that the Commissioner was responding to yet another "case unprovided for," *Peabody Coal*, 537 U.S. at 169, that was neither addressed nor contemplated by the plain language of the statute,[3] *see* App. 26a, and, moreover that hers was a permissible response animated by and fully in keeping with the preamble and legislative history of the Coal Act, App. 27a-30a. Indeed, notwithstanding that Congress did not authorize the Commissioner to assign liability for Eastern Retirees to Petitioners, in the court of appeals view "a contrary holding would allow [them] to shirk their responsibility." App. 32a.

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[3] *But see* 138 Cong. Rec. H11412 (daily ed. Oct. 5, 1992 (statement of Rep. Pickle) (singling out of the entire Energy Policy Bill the super-reachback coal retiree funding provision "taxing companies that have no current connection with the ... coal industry, some out of the coal business for 15 or 20 years" and labeling it "a street gang mugging of an innocent passerby.").

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS HOLDING IS BASED ON A FLAWED READING OF THIS COURT'S RETROACTIVITY AND COAL ACT JURISPRUDENCE.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993), established the general rule that governs the retroactive effect of a constitutional decision of the Court:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 97.

The Court has never addressed the question of whether its requirement that full retroactive effect be given "as to *all events*, regardless of whether such events predate or postdate our announcement of the rule" (emphasis added) may be read to authorize the direct imposition of financial liability on persons as to whom such liability otherwise could not have been lawfully imposed under the enabling statute.

Relying on this Court's retroactivity jurisprudence, however, the court of appeals (and two others before it) has affirmed the Commissioner's administrative decision to redirect to Petitioners liability Congress assigned to others. As a result, the court of appeals embraced a construction of

the Coal Act that flies in the face of its clear text and this Court's Coal Act precedent.

In statutes levying taxes, such as the Coal Act,[4] the general rule requiring adherence to the letter of the language used applies with particular strictness. More than 80 years ago, the Court quoted with approval the words of Lord Cairns in *Partington v. Attorney-General*, L.R. 4 H.L. 100, 122 (1869):

> [A]s I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

United States v. Merriam, 263 U.S. 179, 188 (1923).

Equally well established is the principle that an administrative agency's power to regulate in the public interest "must always be grounded in a valid [statutory] grant

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[4] The Coal Act is codified as an amendment (subtitle J) to the Internal Revenue Code. All courts of appeal considering the issue have held that Coal Act premiums are taxes. *In re Chateaugay Corp.*, 53 F.3d 478, 498 (2d Cir. 1995); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 675 (3d Cir. 1999); *Pittston Co. v. United States*, 199 F.3d 694, 702 (4th Cir. 1999); *In re Sunnyside Co.*, 146 F.3d 1273, 1278 (10th Cir. 1998).

of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Prior to passage of the Coal Act in 1992, the Commissioner had no extant authority to impose on current or former coal operators responsibility for funding health care benefits of retired miners. Since the authority of an agency is "limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), any claimed power to assign employers the obligation to prospectively fund lifetime health benefits for former employees must flow from a statutory grant of power from the Legislature. *See Sigmon Coal*, 534 U.S. at 462 ("Congress . . . did not delegate authority to the Commissioner to develop new guidelines or to assign liability in a manner inconsistent with the statute.").

Adherence to established delegation principles is particularly appropriate in construing the Coal Act. As the dissent recently pointed out in a far less troubling context:

> This [administrative law delegation] principle has special importance with respect to the extraordinary power the Commissioner asserts here: to compel coal companies to pay miners (and their families) health benefits that they never contracted to pay. . . . When an agency exercises a power that so tests constitutional limits, we have all the more obligation to assure that it is rooted in the text of the statute.

Peabody Coal, 537 U.S. at 174 (Scalia, J., dissenting).

The drafters of the Coal Act were no doubt familiar with the near plenary authority that Congress conferred to the Department of Labor to administer the federal black lung program and identify responsible coal operators for black lung benefit payment purposes.[5] When it came to drafting an authorizing statute in 1992 designed to delegate the extraordinary power of allocating tax liability to a particular coal company based on a decades-old employment relationship, however, the 102nd Congress was markedly circumspect. Congress instructed executive branch administrators to implement a fully-reticulated, multi-tiered, responsible operator assignment formula devoid of regulatory wiggle room or flexibility. *See* 26 U.S.C. § 9706(a)(1)-(3); *Sigmon Coal*, 534 U.S. at 459 n.16 (characterizing the authorizing statute at issue as providing an "explicit and all-inclusive scheme" while noting that in the Coal Act, Congress "expressly delineated those parties which *it* sought to attach responsibility") (emphasis added).

This Court has repeatedly cautioned that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *Brown & Williamson Tobacco*, 529 U.S. at 161 (quotation omitted). *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term: Forward: The Court and the Economic*

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[5] *See* 30 U.S.C. § 932(a) ("In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto . . . and thereafter those provisions shall be applicable to such operator.").

System, 98 Harv. L. Rev. 4, 46 (1984) ("If legislation grows out of compromises among special interests . . . a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise. . . . [The statute] is designed to do what it does in fact. The stopping points are as important as the other provisions.").

The stopping point for the Commissioner's imposition of liability on Petitioners to finance retired UMWA miners' health benefits under the Coal Act is section 9706(a)(3). With respect to the Eastern Retirees the Commissioner reassigned to Petitioner in 1999, "*the* signatory operator which employed [the retirees] for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement," 26 U.S.C. § 9706(a) (emphasis added), is Eastern Enterprises or another pre-1974 NBCWA signatory employer.

Eastern Enterprises and the other pre-1974 signatory employers engaged the Eastern Retirees under a coal wage agreement and remain in business. The Commissioner cannot simply disregard the retirees' long-time employment with them, *see* 26 U.S.C. § 9706(b)(2), or write a limiting proviso for pre-1974 wage agreement signatories into the unqualified "signatory operator" definition, 26 U.S.C. § 9701(c)(1). In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held that a federal statute which required a person to register before engaging in the business of accepting wagers, and to pay an occupational tax, violated the defendant's right against self-incrimination. In order to save the statute, the Government urged the Court to permit continued enforcement of the registration and occupational tax provisions, but impose restrictions on the ability of the

authorities as to the use of that information *Id.* at 58. The Court declined, noting that:

> We would be required not merely to strike out words, but to insert words that are not now in the statute. Here, as in the analogous circumstances of *United States v. Reese*, 92 U.S. 214 [(1875)], "This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of duty."

Marchetti, 390 U.S. at 60-61 n.18.

The fact that the former employers of the Eastern Retirees who employed them the longest cannot constitutionally be made to pay for them, or that the 102nd (or a subsequent) Congress could have constitutionally legislated Petitioners into liability for them (based on a fleeting employment nexus), by no means the Commissioner may elevate Petitioners into liability through administrative decision. *See Peabody Coal*, 537 U.S. at 183 (examining the structure of the Coal Act and noting "[f]or each assigned beneficiary, only one signatory operator is held responsible for health benefits, *even if* that miner had worked for other signatory operators that should in perfect fairness share the responsibility") (Scalia, J., dissenting). In the wake of *Eastern Enterprises*, only Congress has the authority to impose on Petitioners liability for retirees that the 102nd Congress, through section 9706(a)(3), allocated to pre-1974 signatories. Congress did not do so.

As to the Eastern Retirees, the section 9706(a) assignment criteria erect an enduring shield which insulates Petitioners (and any and all other active former employers in the miner's chain of signatory employment) from principal responsibility and Coal Act tax liability. Through the authorizing statute's express limitations, Petitioners (and other former employers) are subject at most to paying a pro rata share (as opposed to the entire cost) of the Eastern Retirees' health benefit costs. *See* 26 U.S.C. §§ 9704(a), (d) (prescribing pro rata formula for funding unassigned beneficiary premiums).

Congress made no provision in the Act for assignment other than to the entity it determined principally responsible. Where beneficiaries cannot be assigned to that entity, or where an assigned operator (and its related persons) subsequently go out of business, *see* 26 U.S.C. § 9704(f), the Coal Act directs that the affected beneficiaries are classified as "unassigned" and their health care costs are covered by transfers of interest earned by the AML Fund, 26 U.S.C. § 9705(b).

Moreover, it is clear that the authorizing statute resolves on its face the financing question implicated by the Court's holding in *Eastern Enterprises*, because all 8,000 Eastern Retirees (except for those 1,500 the Commissioner subsequently assigned to Petitioners and other operators) have since seamlessly received their congressionally mandated health benefits from the financing sources for unassigned beneficiaries provided for by Congress in the Coal Act.

The court of appeals' reliance on the Court's 2003 *Peabody Coal* decision as precedent for the Commissioner's

imposition of tax liability here is misplaced. The respondents in that case - Bellaire Corporation and Peabody Coal - were the very operators to whom Congress instructed liability be assigned under section 9706(a). As the Court noted, the Combined Fund afforded those operators what amounted to an interest free loan on payments Congress wanted them to have begun paying into the Combined Fund in 1993. In this respect, the *Peabody Coal* holding is unremarkable. *Peabody Coal*, 537 U.S. at 160 (citing a line of tardy administrative performance cases dating back to 1986 while noting "[h]ence the oddity at this date of a claim that late official action should shift financial burdens from otherwise responsible private purses to the public fisc . . . .").

In sharp contrast, the court of appeals decision below empowers the Commissioner to assign tax liability to Petitioners seven years after enactment for Coal Act retirees the 102nd Congress intended *not* be assigned to them.

A principal reason the court of appeals concluded that it was permissible for the Commissioner to impose liability for Eastern Retirees on Petitioners was that the assignments are authorized by established rules governing the retroactive effect given to judicial decisions. App. at 32a ("[L]egislative intent, as well as the retroactive nature of the *Eastern Enterprises* decision itself, supports a conclusion that the SSA's interpretation was a permissible one.").

Among the core purposes of this Court's retroactivity doctrine is that similarly situated persons are to be treated similarly. In *Harper*, 509 U.S. 86 (1993), giving full retroactive effect to this Court's authoritative statement as to the unconstitutionality of certain preferential state tax schemes meant that similarly situated taxpayers could pursue

refunds from state tax commissioners for amounts the Court revealed they had previously overpaid. Although *Harper* further stated that full retroactive effect would be given to *all events* that predated the rule, *id.* at 97, the decision itself suggests that this is confined to events that animate the claims of litigants before the courts. In *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298 (1994) (cited by the court of appeals), the Court's 1989 ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), revealed the narrow scope of 42 U.S.C. § 1981, and propelled a trial court's dismissal of petitioners' then-pending claim for damages that was premised on the court of appeals' far broader (but unwarranted) reading of that statute. Neither decision, however, can reasonably be read as providing a basis for this Court's approval for the executive or judicial branches to impose liability on taxpayers that is not otherwise authorized by Congress.

In the wake of *Eastern Enterprises*, the Commissioner correctly applied the Court's established retroactivity principles voiding 8,000 assignments made pursuant to section 9706(a)(3) to pre-1974 signatory operators, thereby leading to the Combined Fund's return, beginning in 1998, of taxes assessed and collected from those companies beginning in 1993. *See Mary Helen Coal Corp. v. Hudson*, 235 F.3d 207, 211 (4th Cir. 2000) (giving "full effect" to what the Coal Act had meant continuously since it became law by providing Mary Helen Coal Corp. full reimbursement of premiums it paid back to 1993).

In the instant case, however, the Commissioner has moved well beyond the Court's established retroactivity doctrine. The fact that application of the retroactivity principles means, for current or potential litigants, that Coal

Act tax liability should not have been allocated to them beginning in 1993, does not dispose of the inquiry as to whether the powers delegated by the Legislature to the Commissioner permit the administrative reallocation of this same tax liability in 1999 to some other former employer.

In this regard, the Court has long established that if part of a statute is invalidated as to certain applications, that does not mean the invalidated portion is not to be read and considered when applying the remainder:

> To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act.

Davis v. Wallace, 257 U.S. 478, 484 (1922).

The court of appeals disregarded this principle when, seven years after enactment, it permitted the Commissioner to begin anew and apply section 9706(a)(3) to other employers as though companies that were pre-1974 signatories never existed. *See, e.g., Peabody Coal*, 537 U.S. at 184 (indicating it would be naïve to rely "on guesses as to what Congress would have wanted in legislation as complicated as this.") (Scalia, J., dissenting). Moreover, relying on the Court's retroactively jurisprudence as the basis for reassigning to Petitioners the statutory liability assigned to pre-1974 employers reconfigures the very liability allocation rules that enabled enactment. *See Sigmon*

Coal, 534 U.S. at 461 ("a change in any individual provision could have unraveled the whole.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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